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# In the Supreme Court of the United States

OCTOBER TERM, 1932

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No. ——

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, petitioner

*v.*

KENNETH G. SMITH, AND FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

The Solicitor General, on behalf of Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above cause on October 7, 1932.

**OPINION BELOW**

The United States District Court for the Northern District of Illinois filed no opinion. The opinion of the Circuit Court of Appeals is reported in 61 F. (2d) 324.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 7, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

The sole question presented is the constitutionality of Section 219 (g) of the Revenue Act of 1924, which, as applied to this case, taxes the income of trusts created in 1922 to the grantor, if during the taxable year he has the power in conjunction with a trustee to modify or revoke the trust.

### STATUTE INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

> SEC. 219. (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 960.)

### STATEMENT

The facts admitted by the demurrer (R. 83) may be summarized as follows:

In 1922 five trusts were created by Douglas Smith, the taxpayer, for the benefit of his wife and

children. The trustees consisted of the taxpayer, his son, and a corporate banking company. The son was also a beneficiary; the third trustee was not. (R. 3–4.) Each trust provided as follows (R. 56, 61, 66, 71, 78):

> Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

On October 22, 1924, each of the trusts was modified by striking out the above-quoted language, and thereafter Douglas Smith had no power to modify the trusts. (R. 8.)

Upon the authority of Section 219 (g) of the Revenue Act of 1924, the Commissioner of Internal Revenue required Douglas Smith to report the income of all of these trusts from January 1, 1924, to October 22, 1924, which resulted in a tax of $59,896.51. (R. 8–9.) After payment this suit was instituted to recover the tax. A demurrer to the declaration was overruled (R. 83), and judgment entered for the plaintiffs (respondents here) (R. 84). On appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment and held the statute unconstitutional.

## SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that Section 219 (g) of the Revenue Act of 1924

contravenes the Constitution when applied to a trust created in 1922, under which the grantor had the power in conjunction with a trustee to modify or revoke the trust.

### REASONS FOR GRANTING THE WRIT

The court below has held that Section 219 (g)[1] of the Revenue Act of 1924 is unconstitutional when applied to the facts of this case. The statute in terms applies, and no question of statutory construction is presented. As applied to a case where the grantor had the unrestricted power of revocation at his own option, this Court has held the same section to be within the competency of Congress. *Corliss* v. *Bowers*, 281 U. S. 376. The trust in that case, like the trusts here involved, was created in 1922, and the objection made on the ground of retroactivity was ignored.

It is clear from the legislative history that the statute was enacted to correct an existing evil. See House Report No. 179 on the Revenue Bill of 1924, page 21; Senate Report No. 398 on the Revenue Bill of 1924, page 25, 68th Congress, 1st Session. Consequently it may be assumed that the statute affects numerous cases. The facts in particular cases will of course vary, but this decision declaring the statute unconstitutional in its application to trusts created prior to its enactment will have

[1] The tax is also authorized by Section 219 (h), Revenue Act of 1924, because of the reserved power to modify the trusts.

application in many cases. Provisions similar to Section 219 (g) of the 1924 Act are found in the subsequent Revenue Acts. Section 219 (g) of the Revenue Act of 1926 and Section 166 of the Revenue Acts of 1928 and 1932.

At least one other case is now pending which on its facts presents a closely analogous situation. In *Joseph H. Bromley, Jr., et al.* v. *Commissioner,* 26 B. T. A. 878, pending in the Circuit Court of Appeals for the Third Circuit, each of four brothers created a trust in 1921 for the benefit of his children. The four brothers were trustees of each trust and each trust could be revoked with the consent of all of the trustees. The Board of Tax Appeals held that the income of each trust was taxable to the grantor under Section 219 (g) of the Revenue Acts of 1924 and 1926, and Section 166 of the Revenue Act of 1928, and that thus applied, the statutes were valid.

It is clear that the grantor in the instant case retained some measure of control over the trust corpus. The question whether control must rest with the grantor alone or may be shared with another who is not a beneficiary of the trust in order that the income of the trust may be attributed to the grantor and taxed as his is not settled by any decision of this Court. A somewhat analogous question is now pending before this Court in *Esther Jackson Porter, Executrix, et al.* v. *Commissioner of Internal Revenue,* No. 466, October Term, 1932.

A prompt settlement of the constitutional question is desirable in the public interest. The question is thought worthy of review in this Court, because of its general importance, involving as it does the constitutionality of a Federal statute.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
*Solicitor General.*

JANUARY, 1933.

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